No. 13032

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Appellant,

vs.

PAUL D. MACKIE, and JOSEPH H. LEWIS,
d/b/a MACKIE & LEWIS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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TABLE OF CASES

TEXTBOOKS

STATUTES

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Appeal from the United States District Court,
Western District of Washington,
Northern Division

REPLY BRIEF OF APPELLANT

By reason of the Interstate Commerce Act, a shipper can deliver his goods to an originating rail carrier for transportation to any destination in the United States or adjacent foreign country. One railroad may handle the entire shipment, but the goods may be carried over five or six railroads before they reach their destination. If to reach their destination the goods have to pass over the rails of five or six railroad companies, the shipper does not have to make a contract with each company; he makes a contract with the originating company only, which fixes the obligation of all the participating carriers. If the goods are damaged in transit, the originating carrier or the delivering carrier may be held responsible to the lawful holder of the bill of lading or anyone entitled to recover thereon for the full actual loss, damage or injury to the property, regardless of which of the five or six railroad companies may have

caused the loss, damage or injury. Title 49, Sec. 20(11), U.S.C.A.

If the shipper wants his property transported from Seattle to Norfolk or from Tacoma to Phoenix, it isn't difficult to see that a good many clerks, station agents and trainmen at widely separated points, working for different companies, are going to participate in the carriage of this property.

The Congress of the United States has amended Sec. 20(11), Title 49, U.S.C.A. several times, as inequities in its application have appeared. In 1915 a provision was inserted declaring any limitation of liability unlawful except as to goods on which a declared value had been stated in writing. In 1930 the statute was amended so as to eliminate the provision for notice and extended the time to be allowed for the filing of claims to nine months. But under each amendment the Congress has retained the provision allowing the carrier to provide in its contract of carriage that a claim in writing must be filed.

The question as to whether or not knowledge of the damage to the goods on the part of the carrier waives the necessity of filing a claim in writing in accordance with the terms of the contract has been before the Supreme Court several times.

In the case of *St. Louis, I. M. & S. R. Co. v. Starbird,* 243 U.S. 592, 61 L.ed. 917, the Supreme Court of the State of Arkansas held that the provision in the bill of lading that the shipper shall give notice to the carrier if he intends to claim damage to his goods was reasonable, but that since the superintendent of the dock,

an agent of the terminating carrier, had knowledge of the damage, the necessity of notice was dispensed with. The court held:

> "We find nothing unreasonable in the stipulation concerning notice, and there was no attempt made to comply with it. We therefore think the supreme court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract."

In the case of *Southern Pacific Company v. Stewart,* 248 U.S. 446, 63 L.ed. 350, the owner of the freight failed to comply with the provisions of the bill of lading by giving notice within the time limit. The shipper seeks to avoid the effect of this failure by alleging that the carrier had full knowledge of the injuries sustained by the cattle and that the railroad company had waived its right to notice and recognized the shipper's right to damages by attempting to settle the claim before the time to give the notice had expired. The court then held:

> "Considering the principles and conclusions approved by our opinions in *St. Louis, I. M. & S. R. Co. v. Starbird,* 243 U.S. 592, 61 L.ed. 917, 37 Sup. Ct. Rep. 462, and *Erie R. Co. v. Stone,* 244 U.S. 332, 61 L. ed. 1173, 37 Sup. Ct. Rep. 633 (announced since the judgment below), and the cases therein cited, no extended discussion is necessary to show that upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the

> shipper are inadequate to show a waiver by the carrier of written notice as required by the contract."

In the case of *Baltimore & O. R. Co. v. Leach,* 249 U.S. 217, 63 L.ed. 570, the shipper sought to avoid the effect of his failure to give notice as required by the bill of lading by alleging that he promptly advised the railroad company's agent at destination of all the essential facts, and therefore the requirement of the written notice was waived. The court held:

> "The point involved has been discussed in our recent opinions and we can find nothing which takes this case out of the rule requiring compliance with a provision in a bill of lading like the one above quoted."

There are numerous State Court decisions to the effect that if the carrier has knowledge of damage done to goods, the filing of the claim is not necessary. 9 Am. Jur. 920 states:

> "Although there is some authority to the contrary, the general rule is that failure to give notice of a claim for damages or loss in accordance with a stipulation in a contract for the shipment of goods is excused, or is inapplicable, where the carrier has or is chargeable with actual knowledge of all the conditions as to damages that a written notice could give."

Every authority cited for this statement is a State Court decision. 13 C.J.S. 487 gives the same rule but qualifies it by stating that it is the view taken by various State Courts but that it is not the federal rule. See 13 C.J.S. 488. Also see Brief of Appellant, page 14.

In the instant case all the facts are stipulated and the entire record is before the court.

The District Court found, in Finding No. IX:

> "That on the date of arrival of said shipment at Phoenix, Arizona, an employee of the Southern Pacific Company, one W. G. Howell, inspected the said shipment and made a written report of the results of his inspection to the consignee and said Southern Pacific Company. That said written report provides, among other things,
>
> " 'Extent of damage not known. Consignee will call for final inspection.'
>
> "and that neither the consignee nor the plaintiffs herein called for a final inspection, and that no further inspection was made by the agents or employees of the Southern Pacific Company."

The court also found, in Finding No. XII:

> "The matter of this claim was discussed by the plaintiff, Paul D. Mackie, during the month of May, 1949, and again in the month of June, 1949, with Mr. F. J. Taft, who was at that time the Chief Clerk in the Freight Claim Department of the defendant. During these conversations the said plaintiff advised the said F. J. Taft of his intention to file a claim, and further advised that formal claim was delayed by inability to complete a deal and determine the exact loss."

From these findings it can be seen that the terminating carrier, Southern Pacific Company, knew there was probable damage to the goods, but there was no inspection after the goods had been unloaded, so that the extent of the damage was not known. The originating carrier, Northern Pacific Railway Company, knew

three months after the delivery of the goods, and six months before the time to file a claim would expire, that Mr. Mackie intended to file a claim, but it did not know for how much.

If in this case the facts were that the property had been totally destroyed, the carrier had not accounted for the salvage, and the damage was caused by the admitted negligence of the carrier, as were the facts in *Hopper Paper Co. v. Baltimore & O. R. Co.,* 178 F.(2d) 179, there might be good reason for the court to say that the carrier had knowledge of the damage to the exclusion of the shipper, and therefore the shipper is excused from complying with the terms of the contract.

The contract made between the shipper and the carrier in this case is one authorized and restricted by statute. It provides that a shipper must file a claim in writing with the originating or terminating carrier. "Such notice puts in permanent form the evidence of intention to claim damages and will serve to call the attention of the carrier to the condition of the freight." *St. Louis, I. M. & S. R. Co. v. Starbird,* 61 L.ed. 917, 925, 243 U.S. 592.

> "The transactions of a railroad company are multitudinous, and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to pub-

lic policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations.

"* * * We are not concerned in the present case with any question save as to the applicability of the provision (requiring claim to be filed in writing) and its validity, and as we find it to be both applicable and valid, effect must be given to it.

"* * * Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which, in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement."

Georgia, F. & A. R. Co. v. Blish Milling Co., 60 L.ed. 948, 241 U.S. 190.

In the instant case the appellee intended to file a claim and did so, but he neglected to file it within the nine months' period. When his claim was first denied on the ground that it was not filed within the nine months' period, he complained in his letter of February 24, 1950 (Ex. 5, R. 30) that in his conversations with Mr. Taft, "who was in your department (Western Freight Claim) until he retired last year," he told Mr. Taft of his intention to file a claim and advised that formal claim was delayed by inability to complete a deal and determine the exact loss, and that Mr. Taft did not advise him of the time limit or of any necessity of making the notice a written one, and that he did not read the fine print on the back of the bill of lading.

With his letter of February 2, 1950 (Ex. 3, R. 27), Mr. Mackie's claim for damages, he filed a copy of the inspector's report (Ex. 2, R. 25), which report advised him that he must file a claim in writing and within nine months, but he didn't read that either.

The appellee now seeks to avoid his failure to comply with the terms of the contract by alleging that the appellant had as much knowledge of the claim as he had. The Southern Pacific inspector at Phoenix knew that there was probable damage to the shipment on its arrival, and it seems the Southern Pacific inspector was justified in taking the consignee's word that he would call for a final inspection (Ex. 2, R. 25). Also see court's finding No. IX. The Northern Pacific was orally advised that there was damage. Therefore, if the appellant had as much knowledge of the claim as the appellee, it got the information orally.

The appellant respectfully submits that the court erred in refusing to find:

(1) That the failure of the shipper to file a written claim for damage to his shipment within the time prescribed by the contract of carriage (bill of lading) is such a violation of the contract as to constitute a waiver of the claim.

(2) That a shipper's oral notice to the carrier that he intends to file a claim for damage to his goods in transit is not compliance with the contract, which requires the filing of a claim in writing.

(3) That knowledge of damage to goods in transit on the part of a carrier's agent does not excuse a fail-

ure to comply with the provision of the contract requiring filing of claim in writing.

(4) That a carrier may not waive or ignore a valid provision of the contract under which the shipment was made.

Respectfully submitted,

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